



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

September 10, 1998

Mr. Joe B. Hairston
Walsh, Anderson, Brown,
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P.O. Box 2156
Austin, Texas 78768

OR98-2138

Dear Mr. Hairston:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 117919.

The China Spring Independent School District (the "district"), which you represent, received a request for information concerning the district's investigation of a former school teacher. You state that you will release the teacher's employment application. You also state that much of the requested information does not exist. The Open Records Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.--San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986). You have, however, submitted certain documents that you claim are excepted from disclosure under sections 552.101, 552.102, and 552.114 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that the submitted documents contain educational records that must be withheld pursuant to sections 552.026 and 552.114 of the Government Code, and pursuant to the Family Education Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g. In Open Records Decision No. 634 (1995), this office concluded: (1) an educational agency or institution may withhold from public disclosure information that is protected by FERPA and excepted from required public disclosure by sections 552.026 and 552.101 without the necessity of requesting an attorney general decision as to those exceptions, and (2) an educational agency or institution that is state-funded may withhold from public disclosure information that is excepted from required public disclosure by section 552.114 as a "student record," insofar as the "student record" is protected by FERPA, without the necessity of requesting an attorney general decision as to that exception. Information must be withheld

from required public disclosure under FERPA only to the extent "reasonable and necessary to avoid personally identifying a particular student." Open Records Decision Nos. 332 (1982), 206 (1978).¹ After reviewing the submitted documents, we agree that most of your markings are accurate. We note, however, that name of the classroom teacher where the incidents occurred should be released since this information does not personally identify any of the students. We have also marked additional information that the district must withhold under FERPA.

You first argue that the requested documents are confidential under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. Section 21.355 of the Education Code provides, "Any document evaluating the performance of a teacher or administrator is confidential." This office has interpreted this section to apply to any document that evaluates, as that term is commonly understood, the performance of a teacher or administrator. Open Records Decision No. 643 (1996). After reviewing the documents at issue, we conclude that the documents are not teacher evaluations and may not be withheld under section 21.355 of the Education Code.

You also assert that the teacher may have a privacy interest in the requested information. Section 552.101 applies to information when its disclosure would constitute the common-law tort of invasion of privacy through the disclosure of private facts. To be within this common-law tort, the information must contain highly intimate or embarrassing facts about a person's *private* affairs such that its release would be highly objectionable to a reasonable person *and* the information must be of no legitimate concern to the public. *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 550 (Tex. App.--Austin 1983, writ ref'd n.r.e.).

The information at issue pertains solely to an employee's actions while acting as a public servant and the conditions for continued employment, and as such cannot be deemed to be outside the realm of public interest. See Open Records Decision No. 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees). Consequently, the district may not withhold any of the information at issue pursuant to common-law privacy.

Section 552.101 also excepts from disclosure information protected by constitutional privacy. The constitutional right to privacy consists of two related interests: 1) the individual interest in independence in making certain kinds of important decisions, and 2) the individual interest in independence in avoiding disclosure of personal matters. The first

¹But see 20 U.S.C. § 1232g(a)(1)(A), (d) (parent or adult student has affirmative right of access to that student's education records). See also Open Records Decision No. 431 (1985) (Open Records Act's exceptions to required public disclosure do not authorize withholding of "education records" from adult student).

interest applies to the traditional “zones of privacy” described by the United States Supreme Court in *Roe v. Wade*, 410 U.S. 113 (1973), and *Paul v. Davis*, 424 U.S. 693 (1976) and are clearly inapplicable here.

The second interest, in nondisclosure or confidentiality, may be somewhat broader than the first. Unlike the test for common-law privacy, the test for constitutional privacy involves a *balancing* of the individual’s privacy interests against the public’s need to know information of public concern. Although such a test might appear more protective of privacy interests than the common-law test, the scope of information considered private under the constitutional doctrine is far narrower than that under the common law; the material must concern the “most intimate aspects of human affairs.” See Open Records Decision No. 455 at 5 (1987) (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490 (5th Cir. 1985)). As noted above, the information you seek to withhold does not concern intimate aspects of an individual’s private affairs, but rather directly pertains to the teacher’s job performance. The district may not withhold any of the requested information under either constitutional or common-law privacy.

You also express concern that the release of the requested information would violate the former teacher’s liberty interests under the Fourteenth Amendment of the United States Constitution. We note, however, that

[t]o establish a liberty interest, an employee must demonstrate that his governmental employer has brought *false charges* against him that might seriously damage his standing and associations in his community, or that impose a stigma or other disability that forecloses freedom to take advantage of other employment opportunities. *Board of Regents v. Roth*, 408 U.S. 564 (1972).

Wells v. Hico Indep. Sch. Dist., 736 F.2d 243, 256 (5th Cir. 1984) (emphasis added; parallel citations omitted). It is not apparent to us, however, that the requested information constitutes a “false charge.” Consequently, the release of this information would not implicate the teacher’s Fourteenth Amendment interests.² Furthermore, even if it did, we are aware of no authority for the proposition that information may be withheld under section 552.101 on this basis.

Finally, we note that some of the submitted documents are confidential by law. Section 261.201(a) of the Family Code provides:

The following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be

²We further note that information regarding public employees may not be withheld under section 552.101 merely because the information is false. See Open Records Decision No. 579 (1990).

disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

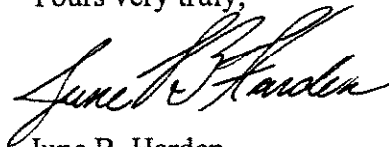
(1) a report of alleged or suspected abuse or neglect [of a child] made under this chapter and the identity of the person making the report; and

(2) except as otherwise provided in this section, the files, reports, records, communications, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

You have not cited any specific rule that the district has adopted with regard to the release of this type of information; therefore, we assume that no such regulation exists. Given this assumption, some of the submitted records appear to constitute "files, reports, records, communications, and working papers used or developed in an investigation" under chapter 261 of the Family Code and are thus confidential. *See* Open Records Decision No. 440 at 2 (1986) (predecessor statute). It does not appear nor do you indicate that all of the submitted documents were "used or developed in an investigation" under chapter 261 of the Family Code." Accordingly, we have marked the documents made confidential by section 261.201 of the Family Code that the district must withhold from disclosure under section 552.101 of the Government Code. We note that if the remaining documents were used or developed in the chapter 261 investigation, they too must be withheld.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,



June B. Harden
Assistant Attorney General
Open Records Division

JBH/ch

Ref.: ID# 117919

Enclosures: Submitted documents

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(w/o enclosures)